

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MIAMI COUNTY**

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|---------------------|---|--------------------------------|
| STATE OF OHIO | : | |
| | : | Appellate Case No. 2015-CA-8 |
| Plaintiff-Appellee | : | |
| | : | Trial Court Case No. 12-CR-421 |
| v. | : | |
| | : | (Criminal Appeal from |
| JOSEPH GILBERT | : | Common Pleas Court) |
| | : | |
| Defendant-Appellant | : | |
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OPINION

Rendered on the 19th day of June, 2015.

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ANTHONY E. KENDELL, by JANNA L. PARKER, Atty. Reg. No. 0075261, Miami County
Prosecutor's Office, 201 West Main Street, Troy, Ohio 45373
Attorneys for Plaintiff-Appellee

JOSEPH GILBERT, #677-161, Belmont Correctional Institution, Post Office Box 540,
St. Clairsville, Ohio 43950.
Defendant-Appellant, *pro se*

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HALL, J.

{¶ 1} Joseph Gilbert appeals *pro se* from the trial court's denial of his
post-sentence motion to withdraw a plea to charges of rape (victim under age ten) and

gross sexual imposition.

{¶ 2} Gilbert advances two assignments of error. First, he contends the trial court erred in not allowing him to withdraw his plea. Second, he claims the trial court erred in imposing a sentence that is contrary to law.

{¶ 3} The record reflects that Gilbert was indicted on the above-referenced charges in December 2012. Pursuant to a negotiated plea agreement, he pled no contest to the charges in exchange for a jointly-recommended sentence of fifteen years to life in prison on the rape charge and a concurrent five-year prison term on the gross sexual imposition charge. In January 2013, the trial court accepted the no-contest plea, found him guilty, and imposed the agreed-upon sentence. Gilbert then filed a direct appeal, arguing that the trial court failed to determine whether his crimes should have merged as allied offenses. This court agreed and remanded for a hearing on the issue. See *State v. Gilbert*, 2d Dist. Miami No. 2013 CA 34, 2014-Ohio-1976. On remand, on May 27, 2014, the parties stipulated that the crimes involved separate acts committed on separate dates and did not merge. This result was docketed by entry filed May 28, 2014.

{¶ 4} Thereafter, on January 9, 2015, Gilbert filed a pro se motion to withdraw his plea pursuant to Crim.R. 32.1. (Doc. #31). He argued that his plea was not knowing, intelligent, and voluntary. He also alleged that the plea resulted from ineffective assistance of counsel. Specifically, he asserted that his attorney had failed to discuss the case with him, interview witnesses, attempt to locate the “true offender,” correctly inform him about guilt and sentencing, produce mitigation evidence, or discuss defenses, strategies or tactics. (*Id.* at 4). In a supporting affidavit, Gilbert claimed he had been “high” on heroin, Xanax, and anti-depressants when police questioned him after his arrest (not

at the time of his plea). He also asserted that the prosecutor lacked evidence and that the investigating sheriff's deputy was a friend of the victim's family. He learned about this friendship when he received his "discovery pack" and brought this fact to the attention of his lawyer before he entered his pleas. Gilbert further averred that his attorney only visited him once in jail and later told him the best deal he could get was fifteen years to life in prison. Gilbert also stated that he wanted to proceed to trial but his attorney coerced or misled him into pleading no contest. (*Id.* at affidavit). In a reply brief, Gilbert argued that the sheriff's investigation had been biased and that the investigation results should have been inadmissible in grand-jury proceedings. He also argued that he had pled no contest under duress and that his sentence was contrary to law. (Doc. #33). The trial court overruled Gilbert's motion in a February 12, 2015 decision and judgment entry. (Doc. #34). It found his claims largely belied by a transcript of the Crim.R. 11 plea colloquy. It also found that his jointly-recommended sentence was authorized by law. (*Id.*).

{¶ 5} In his first assignment of error, Gilbert addresses only his assertion that the sheriff's office investigation was biased due to a personal friendship with the victim's family. (Appellant's brief at 2). He maintains that he was prejudiced by the biased investigation and that the results of the investigation should not have been presented to the grand jury. (*Id.*). This argument fails to persuade us that the trial court erred in denying his plea-withdrawal motion. A plea may be withdrawn after sentencing only to correct a manifest injustice. *State v. McCommons*, 2d Dist. Montgomery No. 26372, 2015-Ohio-1583, ¶8. This requires a defendant to show extraordinary circumstances. *Id.* We review a trial court's denial of a hearing on a plea-withdrawal motion and its denial of the motion itself for an abuse of discretion. *Id.* at ¶ 6.

{¶ 6} Here we see no abuse of discretion in the trial court's denial of Gilbert's motion without a hearing. As for the argument he raises on appeal, his claim about an allegedly biased investigation does not justify withdrawing his no-contest plea. According to the affidavit he filed below, Gilbert knew about the alleged friendship between the investigating sheriff and the victim's family *before* he entered his plea. (Doc. #31 at affidavit). Gilbert also averred that he informed his attorney about the friendship *before* he entered his plea. (*Id.*). Despite that fact, Gilbert failed to mention the issue during his plea hearing or to raise any concern about his attorney's representation. To the contrary, he confirmed that he had received enough time to talk to his attorney about the case, that he was satisfied with his attorney's advice, and that he believed his attorney had done a good job. (Tr. at 6-7). He also told the trial court that he was not under the influence of anything that would interfere with his ability to understand what was happening. (*Id.* at 4-5).

{¶ 7} Because Gilbert knew about the allegedly biased investigation conducted by the sheriff's office before he entered his plea yet said nothing about the issue when entering his plea, he cannot rely on that investigation to establish a manifest injustice warranting withdrawal of the plea. Accordingly, the trial court did not abuse its discretion in denying Gilbert's motion without a hearing. The first assignment of error is overruled.

{¶ 8} In his second assignment of error, Gilbert argues that the rape sentence he received is contrary to law. This argument lacks merit. The jointly-recommended sentence Gilbert received is not contrary to law. Gilbert faced a potential sentence of life in prison without parole for raping a child under age ten, as alleged in the indictment. See

State v. Gibson, 2d Dist. Clark No. 2013 CA 112, 2014-Ohio-5573, ¶ 11, quoting R.C. 2907.02(B). Pursuant to the plea agreement, however, the trial court elected to impose a prison sentence of fifteen years to life in prison, which was another available option. *Id.* at ¶ 12, quoting R.C. 2971.03(B)(1)(b). This sentence manifestly was authorized by law along with the concurrent prison term for gross sexual imposition. The second assignment of error is overruled.

{¶ 9} The judgment of the Miami County Common Pleas Court is affirmed.

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DONOVAN, J., and WELBAUM, J., concur.

Copies mailed to:

Anthony E. Kendell
Janna L. Parker
Joseph Gilbert
Hon. Christopher Gee